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No. 99-62

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; **JANE DOE #2**, individually and as next friend for her minor child, John Doe, Minor Child; and **JOHN DOE**, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ARGUMENT

This supplemental brief addresses the implications for the present case of this Court's decision in *Board of Regents v. Southworth*, No. 98-1189 (U.S. Mar. 22, 2000). The *Southworth* decision, while largely inapposite to the present case, supports several principles underlying the Santa Fe Football Policy. Contrary to respondents' contentions, *Southworth* does not undercut the constitutionality of the Santa Fe Policy, but rather reinforces it.

Respondents seize upon *Southworth* as supposedly rejecting "two central pillars of Santa Fe's argument," Supplemental Brief for Respondents (Resp. Supp. Br.) at 1. Respondents are mistaken. In fact, their facile overreading of *Southworth* illustrates the flaws of respondents' arguments in this case. *Infra* § II.

As an initial matter, it must be acknowledged that *Southworth* and the present case proceeded under quite distinct legal theories. *Southworth* involved a free speech challenge; the present case involves an Establishment Clause challenge. *Southworth* involved compulsory funding of speech; here, no funding is at issue. *Southworth* entailed a challenge to objectionable uses of student fees; the case at bar entails a facial challenge to a speaker policy, regardless of what the student speakers say.[1] Thus, any comparison between

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[1] Respondents suggest that *Southworth* modified *sub silentio* the standards governing facial challenges. Resp. Supp. Br. § III. This is inaccurate. First, as respondents concede, the facial standard issue "drew little comment in the opinion." *Id.* at 8. This is an understatement. The opinion is entirely silent on whether the case presented a facial or as applied challenge. Of course, even if the Court had addressed the issue and applied a less demanding standard to plaintiffs' free speech challenge, that conclusion would have no force outside the free speech context, where the Court has long applied a less demanding standard in facial challenges. *See, e.g., Secretary of State v. J. H. Munson Co.*, 467 U.S. 847 (1984). Respondents' contention ultimately reduces to the proposition that the Court took the opportunity in a free speech case to overrule *sub silentio* this Court's rule that "[i]t has not been the Court's practice, in considering facial challenges to statutes . . ., to strike them down in anticipation that a particular

(continued...)

Southworth and the present case will necessarily be somewhat remote.

Despite these necessary limitations on any such comparison, *Southworth* does underscore the constitutionality of the Santa Fe Football Policy in several respects.

First, *Southworth* reaffirms the importance of government acting in a viewpoint-neutral manner toward private speech. Slip op. at 11, 14-15. The attempt by respondents to impose on school districts a duty to censor out the religious speech of student speakers, *see* Pet. Br. § III; Reply Br. § III(D), flies in the face of this admonition.

Second, *Southworth* reaffirms the importance of deferring to educational institutions regarding the pursuit of their educational missions. Slip op. at 13-14. If universities can decide that it promotes education to allow students free speech, give them the money for that speech, and involve students in the process of distributing that money, *id.*, Santa Fe can certainly decide that it furthers student education to involve students in the process of delivering a pregame message or invocation.

Third, as set forth in greater detail below, *infra* § I, *Southworth* reaffirms that student-initiated, student-led speech is *private* speech, not government speech, even if the school provides both the setting and the funding for the speech.

I. *Southworth* Underscores that the Santa Fe Policy Involves Private Speech, Not Government Speech.

All parties agree that there is a "crucial difference between government speech endorsing religion, which the Establishment Clause prohibits, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality); *see*,

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[1](...continued)
application may result in unconstitutional [action]." *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (*quoting Roemer v. Board of Public Works*, 426 U.S. 736, 761 (1976) (plurality)).

e.g., Resp. Br. at 9-10. The critical question that divides the parties is whether the speech permitted under Santa Fe's Football Policy is student speech or government speech. This Court's recent decision in *Southworth* bolsters the conclusion that the Santa Fe Football Policy involves student, not government, speech.

The student reimbursement policy at issue in *Southworth* featured far greater government involvement in student speech and far greater risks of perceived government endorsement of the resulting speech. In *Southworth*, the student government forwarded its funding decisions "to the chancellor and to the board of regents for their review and approval." Slip op. at 5-6. The University also "regulat[ed] the conduct and activities of" student organizations. *Id.* at 7. Exact comparisons are difficult because Santa Fe's Football Policy is so different from *Southworth*'s compelled funding program. For example, under the Football Policy, student decisions as to whether to have a speaker, which student will speak, and what the individual student will say all rest exclusively with students and are not subject to school "review and approval."

In addition, *Southworth* involved government funding of speech, which raises unique risks of endorsement. Recognizing these concerns, Justice O'Connor emphasized that *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), involved more than just a straightforward application of cases, like *Mergens*, involving only access for speech. *See* 515 U.S. at 846-48 (O'Connor, J., concurring). This case, like *Mergens*, but unlike *Rosenberger* and *Southworth*, involves the easier context of speech only. No funding is at issue.

Even though *Southworth* featured government funding and pervasive school involvement, this Court emphasized, without equivocation, that the resulting speech "is not that of the University or its agents." Slip op. at 16. This was no mere dictum. That the case featured student rather than University speech determined the nature of the Court's inquiry. *See id.* at 10.

Although the University encouraged the speech, regulated the student clubs, and ultimately reimbursed students for the cost of their speech, the resulting student speech was not transformed into government speech through the kind of alchemy advocated by respondents. Instead, the Court reaffirmed that government speech retains its commonsense definition. If government officials "were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* That was not the case in *Southworth* because, as the Court emphasized, "[t]he University's whole justification for fostering the challenged expression is that it springs from the initiatives of students," *id.* That is also true here. Santa Fe has opened a venue for student-led, student-initiated expression. The individual student speaker acts as a circuit breaker who alone determines the content and viewpoint of the speech. As *Southworth* underscores, the resulting speech is self-evidently student speech.

Southworth also makes clear that Santa Fe has disclaimed responsibility for any student speech in a manner that reinforces the Football Policy's constitutionality. In emphasizing that *Southworth* involved student speech, the Court observed that "[t]he University ha[s] disclaimed that the speech is its own," *id.* Of course, the University did not send a representative to every student club meeting to utter an affirmative oral disclaimer that any speech that occurred was solely that of the students, and not government speech. Instead, the Court found a disclaimer based on the University's administration of the policy as a whole. The Santa Fe Football Policy includes just such a disclaimer on the face of the policy. The Football Policy emphasizes that the "student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver." As in *Southworth*, Santa Fe has "disclaimed the speech as its own."

II. The Student Election of a Speaker Bears No Resemblance to the Majoritarian Defunding Referendum Questioned in *Southworth*.

Southworth concluded that a peculiar provision of the compelled funding mechanism, which permitted a majority of students to defund an unpopular club through a referendum, required further analysis on remand to determine whether it was viewpoint neutral. *See* slip op. at 16-17. Respondents take this language out of its free speech/compelled funding context and suggest that the Football Policy is doomed because it involves student votes. In respondents' view, *Southworth* signals the end of the Nation's long (and apparently nefarious) experiment with student elections, as long as a right to speak hangs in the balance. This is not an exaggeration of respondents' position. It is their position. "[*Southworth*] does mean that wholly private speakers cannot be elected for the sole purpose of speaking," Resp. Supp. Br. at 7; *see also id.* ("Private speakers given preferential access must be selected on viewpoint-neutral criteria, and winning an election is not such a criterion").

Respondents view of *Southworth* is flatly wrong. *Southworth* did not hold that all student elections[2] violate the right to free speech. (Even if this were true, it would scarcely help respondents, who bring no free speech claim.)

Respondents confuse the selection of the one to fill a position with the allocation of access or other resources. The foundation of democratic process is selection, by election, of representatives. Voters select those who will speak for them in the federal, state, and local government. Students likewise

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[2]Respondents claim to distinguish the "election of public officials or student leaders to perform many diverse tasks over a period of time, only some of which involve speech," Resp. Supp. Br. at 2; *see also id.* at 9. This supposed distinction does not assist respondents. First, the primary task of elected representatives *is* to speak, whether by vote as legislators or by advocacy of policies and proposed legislation. Second, if elections are viewpoint-based, it is *worse*, not better, if the winner of the fatally viewpoint-based election has the power to act as well as speak.

select those who will speak for them in student government. Selection by election is also used to confer honors and privileges. The Speaker of the House and the recipients of Congressional Medals of Honor, for example, are the beneficiaries of votes from an electoral body. Student analogues might include the selection of a talent show winner, a Hall of Fame inductee, a "Favorite Teacher" award recipient, or a Homecoming Queen. It is absurd to read *Southworth* as judging these elections to be unconstitutionally viewpoint-based. Thus, whether the student speaker under the Football Policy is viewed as an elected representative or as the recipient of an honor or privilege, *Southworth* casts no shadow of unconstitutionality.

In *Southworth*, by contrast, a variety of student groups enjoyed equal rights to use facilities and seek funding, except that a majority vote could cancel -- or guarantee -- the funding of any particular disfavored -- or favored -- group. This arbitrary imposition of inequality among equals is what troubled the *Southworth* Court. Suppose, for example, that a school, while otherwise observing the Equal Access Act, conditioned a student club's existence upon approval by a majority vote of students at large. This subjecting of clubs to a "heckler's license" would violate the free speech (and association) rights of the would-be club members under *Southworth*. But a student vote for "Club of the Year" distinction in the student yearbook would impose no unequal burden, and would create no free speech difficulty.

Student elections are common features of student life. They are the normal mechanism for electing a student for an honor or responsibility. Indeed, involvement in such voting processes helps prepare students for the duties of citizenship in a republican democracy. Deviation from the normal student election process would necessitate some explanation. It is hard to imagine how the explanation could be delivered without sending messages of distrust of students and hostility toward religion. The defunding referendum in *Southworth*, by contrast,

is hardly a common or normal feature of student life. Rather than selecting a student for a duty, office, or honor, the referendum singles out one club for a loss of funding that all clubs would otherwise share more or less equally based on neutral criteria.

In short, nothing in *Southworth* suggests that students could not participate in more traditional elections.

Respondents' distorted view of *Southworth* implies that a runner-up in a student election could sue, claiming that the selection process was viewpoint-based. But the fact of the matter is that such a student litigant would lose, and rightly so. *Southworth* does not invigorate such a frivolous free speech claim,[3] much less an Establishment Clause claim.

Finally, respondents ignore that they have not elected to bring a free speech challenge to the Santa Fe Policy. An intervening decision of this Court allows a party to file a supplemental brief, not to amend its complaint.

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[3]The student respondents here do not in any event claim that they were wrongfully denied (or even sought) the position of pregame student speaker.